dence Act the presumption that arises is that the steps were not taken.

Article 29 provides for the obtaining of a valuation of the shares in the event that any difference arises between the vendor member and the purchasing member as to the fair value of the shares. It follows that the negotiation of the purchase price is a matter to be left to the vendor and the individual purchaser concerned and it is for one or the other of them to seek the opinion of the auditor which could be done if and when the negotiations failed. It also follows that the Company having found purchasers for the shares should have forthwith provided the vendor with their identity to enable the vendor and the purchasers to complete the negotiations.

In my judgment the scheme of the pre-emptive procedures for sale of shares made it necessary for the offer for sale and acceptance of the offer to be made without a specification of the sale price. Both the vendor and the purchaser will be bound to complete the sale on the basis of a purchase price which shall be the fair value of the shares with a proviso that the parties may agree on what is the fair value – clearly they must be given the opportunity of arriving at an agreement on fair value.

What in fact transpired was that the pre-emptive procedures were ignored. The vendor and the purchasers were never given an opportunity of negotiating the purchase price. The Company obtained a figure from the auditors and sought to impose that figure on the parties as being the fair value.

Now, it is only what is certified by the auditor on the application of either party to a sale that will be deemed to be the fair value. What is certified on the application of other parties (including the Company or its directors) does not necessarily have to be deemed to be fair value for purposes of Article 30. Further Article 30 specifies that such an opinion by the auditor will be regarded simply as an expert's opinion and not a finding of fact by an arbitrator. I understand that provision to mean that the auditor's opinion can be subjected to scrutiny which in my judgement on the facts of the instant case it cannot stand. *Ex facie* the fair value of a share in a going concern, on or about June 1983, cannot be the net tangible asset value of the share as on March 31, 1982. Over a year had passed since March 31, 1982 and in any event fair value must surely be the sum of the net tangible asset value and the net value of the intangibles. The omission of the value of intangibles could be a serious omission. In a service oriented business for instance, the intangibles may be worth much more than the tangible assets. When the business has been long established it may enjoy a goodwill which is an intangible asset and which may be of considerable value.

In the event I had no hesitation in granting the application in the terms of prayers a), b) and c). I also provided for the costs of the application.

Order accordingly.

Solicitors: *Shook Lin & Bok; Annarasa & Co.*

NG BROTHERS CONSTRUCTION v. KAOLIN (MALAYSIA) SDN. BHD.

[A.C.J. (Wan Hamzah J.) April 7, 1984]
[Kuala Lumpur – Civil Appeal No. 30 of 1982]

Contract law – Offer and acceptance of quotation – Subject to formal agreement – Whether binding contract – Variation – Mistake – Authority – Breach – Damages.

The respondent Kaolin (Malaysia) Sdn. Bhd. ("Kaolin") asked the appellant Ng Brothers Construction ("Ng Construction") to submit a quotation for the construction of a clay factory complex for Kaolin. Ng Construction by letter dated December 15, 1969 gave a quotation which was accepted by Kaolin by letter dated December 27, signed by its Production Assistant, stating that a formal agreement would be signed later. Ng Construction claimed that the exchange of the two letters had created a binding contract and that Kaolin by letter of January 6, 1970 had purported to determine the contract. Ng Construction therefore claimed damages for breach of contract. Kaolin maintained that as no formal agreement was signed, there was no binding contract between them.

The Sessions Court dismissed the suit of Ng Construction, holding that there was no binding contract. Ng Construction appealed.

Held: allowing the appeal: (1) on acceptance by letter dated December 27, 1969 of the quotation in the letter of December 15, there was a contract binding on both parties. Any subsequent disagreement between the parties on any proposal to vary the terms of the contract did not affect the contract.

(2) Kaolin's letter of December 27, 1969 had been issued with authority.

(3) in the circumstances, Kaolin was in breach of

the contract. Ng Construction was therefore entitled to damages assessed at $10,000 and costs.

CIVIL APPEAL.

Shahul Hameed Amiruddin for appellant.
Ong See Seng for respondent.
Cur. Adv. Vult.

Wan Hamzah J.: Ng Brothers Construction (hereafter referred to as Ng Construction) as a firm sued Kaolin (Malaysia) Sdn. Bhd. (hereafter referred to as Kaolin Bhd.) for breach of agreement. It appears that the suit was first registered in the Kuala Lumpur High Court in 1973 but was later transferred to the Kuala Lumpur Sessions Court and registered there as Civil Action No. 294 of 1980.

The facts of the case were as follows. Kaolin Bhd. wanted to get a clay factory complex built at Tapah, Perak, and asked Ng Construction to submit a quotation for the construction of the complex. In compliance, Ng Construction by letter dated December 15, 1969 gave a quotation. In reply Kaolin Bhd. sent a letter dated December 27 1969 addressed to the manager of Ng Construction, which read as follows:—

"Thank you for your quotation dated December 15, 1969. We are pleased to inform you that we have accepted your quotation and therefore you may treat this letter as our official order to you.

We expect to commence work on site in early January, 1970 therefore please collaborate with other contractors to work out when you should start your own work.

We would also be sending you at a later date an official contract agreement for you to sign to complete the usual formality."

In the Statement of Claim Ng Construction pleaded that the two exchanged letters dated December 15, 1969 and December 27, 1969 had created a binding contract between them, and alleged that by letter dated January 6, 1970 Kaolin Bhd. purported to determine the contract by unlawfully withdrawing their acceptance of the contract and thereby committed breach of the contract. Therefore Ng Construction claimed damages for the breach of the contract.

Kaolin Bhd. pleaded that the letters of December 15, 1969 and December 27, 1969 did not constitute a valid contract in that the acceptance by Kaolin Bhd. in their letter of December 27 1969 was subject to a formal agreement to be signed by both parties at a later date but no such formal agreement was entered into. Further and in the alternative it was pleaded by Kaolin Bhd. that "there was a subsequent variation of the terms by the Plaintiffs which were not accepted by the Defendants". In the Statement of Defence there were no particulars given of the alleged variation, but the nature of the alleged variation became clear when Ng Shing Cheh, witness for Ng Construction, gave evidence.

At the end of the trial in the Sessions Court the President dismissed the suit. He held that the letter of December 15, 1969 from Ng Construction was only a quotation and not an offer, that the letter dated December 27, 1969 of Kaolin Bhd. was an acceptance of the quotation with a qualification in that it required Ng Construction to sign a formal contract, and that this later letter was an offer and Ng Construction had not accepted it. The President thus concluded that there was no contract between the parties. Ng Construction now appeals against the President's decision.

At the trial Ng Shin Cheh, the managing partner of Ng Construction gave evidence. He testified, *inter alia*, as follows:—

"He (Lee Ming Tee) is of Kaolin (Malaysia) Sdn. Bhd. . . . . My intention in meeting Lee Ming Tee was to construct clay factory at Tapah. Lee Ming Tee asked me to make a plan of a clay factory. He gave me the measurements and asked me to draw the plan. He mentioned the price was $230,000. He asked me to draw a plan of a clay factory costing that amount. He asked me to do it as soon as possible. He asked me to draw a sketch plan first. I was promised of the contract work of the factory. There was a condition of the contract that the price should not exceed $230,000. I prepared the sketch plans. (Nine plans were identified by this witness and produced and marked as Exhibits P1A – I). All these plans were drawn by . . . . . architects and me . . . . . approved by the Defendants. After that Lee Ming Tee asked me to draw detailed plans . . . . . Detailed plans mean what materials to use, specification plans, the elevations. In short . . . . . final plans. I submitted the final plans to the Defendants. (Twelve final plans were identified by the witness, and produced and marked as Exhibits P2A – L). The materials to be used were timber for roofs, concrete walls. It was hard wood timber. P1A – I were approved by Defendants' architect. He was Mr. Chin. P2A – L were approved by Lee Ming Tee . . . . . and architect Mr. Chin. Then I submitted my quotation by a letter dated 15.12.1969. The total amount quoted was $212,008. My quotation was accepted by the Defendants by their letter dated 27.12.1969 . . . . . In my conversation with the Defendants I was asked to complete it very fast. After receiving the letter of acceptance I prepared immediately. I looked for workers and machineries, arranged for transportation to bring the workers to see the work site. I also bought the materials. I photostated the details plans for the workers. The place of work was . . . . . about 120 miles away from my place Klang . . . . .

Defendants' architect wanted to use kiln dry timber . . . . . The Defendants prepared a contract. In the detail plans hard wood timber was to be used. This was agreed to by the Defendants' architect. I first came to know that kiln dry timber was to be used was when I was starting work . . . . . In the contract kiln dry timber was mentioned. I did not sign the contract because my details plan was to use hard wood timber but in the contract I was to use kiln dry timber. . . . . hard wood timber appears in P2. It is marked as H.W. in P2. Because they asked for kiln dry timber, I asked for extra money. It would have cost more if I was to use kiln dry timber . . . . . On 5.1.1970 I met Lee Teng Woon. He told me not to start work yet . . . . . because I asked him to add extra money for using kiln dry timber . . . . ."

A letter dated January 6, 1970 was sent by Kaolin Bhd. to Ng Construction. It read as follows:—

"Reference our meeting between our Lee/Ng Brothers at our Office on the January 5, 1970.

Now that you have submitted an additional amount of monies to your original quotation vide your letter of quotation dated 15/12/69, we are now considering whether to accept your new contract sum in light of the above addition.

Should the Company after consideration accept your new quotation you will be notified in writing for the execution of the above construction.

This letter supersedes our letter of offer to you dated December 27, 1969."

At the trial Kaolin Bhd. did not adduce any evidence to refute the testimony of Ng Shin Cheh. I do not see any reason why the evidence of Ng Shin Cheh should not be accepted.

Ng Shin Cheh's evidence throws some light on the question as to what Kaolin Bhd. meant by their allegation in the Statement of Defence of "subsequent variation of the terms by the Plaintiffs which were not accepted by the Defendants". I believe that Kaolin Bhd. meant to aver that Ng Construction had required an increase in the cost of construction for the change from *hard wood timber to kiln dry timber* and Kaolin Bhd. did not accept the increase. It should be noted that in Kaolin Bhd.'s pleading there was no allegation of mistake between the parties, i.e. there was no allegation that at the time when the letters were being exchanged Kaolin Bhd. thought the quotation included a quotation for the use of kiln dry timber. It appears that what was contended by Kaolin Bhd. was that after the exchange of the letters Kaolin Bhd. decided that kiln dry timber should be used and in the negotiation subsequent to the exchange of the letters the parties could not agree on the cost and therefore there was no contract binding the parties. In their pleading Kaolin Bhd. alleged "variation of the terms". There was no allegation of mistake of the terms in their pleading. The fact that there was no mistake between the parties at the time of the exchange of the letters is borne out by evidence. Some of the detail plans Exhibit P2 clearly show that ordinary hard wood (H.W.) was to be used. None of the plans produced to the court show that kiln dry timber was to be used. Before the quotation was made the plans were submitted to Kaolin Bhd. and approved by Kaolin Bhd. and this fact was not denied by Kaolin Bhd. In Ng Construction's letter of December 15, 1969 (Exhibit P3) in which quotation was given, it was clearly stated that the quotation was for construction in accordance with the submitted plans. Therefore there should not be a mistake on the part of Kaolin Bhd. when they accepted the quotation. The result was that on acceptance of the quotation there was a contract binding on both parties and any subsequent disagreement between the parties on any proposal to vary the terms of the contract did not affect the contract and the contract remains valid and binding.

It is true that Kaolin Bhd.'s letter of acceptance dated December 27, 1969 (Exhibit P4) contains the following statement:—

"We would also be sending you at a later date an official contract agreement for you to sign to complete the usual formality."

That statement implies that after the acceptance the parties can negotiate on necessary terms which had not been discussed and if further terms were agreed upon they would be included in the formal agreement to be signed. But that statement does not imply that terms which had been agreed upon would be renegotiated, or that a party can withdraw its agreement to any terms which had been agreed upon, or that the contract would be rendered null and void by a party withdrawing its agreement to any terms which had been agreed upon.

After the conclusion of the contract by the exchange of the letters dated December 15, 1969 and December 27, it was open to Kaolin Bhd. to suggest to Ng Construction to use kiln dry timber and it was also open to Ng Construction to ask for increase in the price for using kiln dry timber.

But the fact that Kaolin Bhd. and Ng Construction were unable to agree on increased price did not affect the contract which had been concluded earlier. Since the parties could not agree on increased price they should carry out the contract which they had earlier concluded.

As a further or an alternative ground of defence it was pleaded by Kaolin Bhd. that the letter of acceptance of Ng Construction's quotation was written by a person without authority. The letter of acceptance dated December 27, 1969 bears the letter head and the chop of Kaolin Bhd. It shows that a copy of it was extended to the Secretary of Kaolin Bhd. *Prima facie* it was written with authority, and the burden lies on Kaolin Bhd. to show that Roland Lee who signed the letter had no authority to accept the quotation and to issue the letter. At the trial evidence was adduced to show that Roland Lee was not a director of Kaolin Bhd. but employed by Kaolin Bhd. as Production Assistant. There was no evidence to show that Roland Lee had not been instructed or authorised to issue the letter. In a subsequent letter dated January 6, 1970 (Exhibit P5) sent by Kaolin Bhd. to Ng Construction it was stated as follows:—

"This letter supersedes our letter of offer to you dated December 27, 1969."

The word "our" in the above statement seems to recognise that the letter of December 27, had been issued with authority. That the letter of January 6, 1970 was intended to supersede the letter of December 27, 1969 also shows such recognition. If the letter of December 27, 1969 had not been issued with authority, there would not be question of superseding and the fact of lack of authority would have been stated in the letter of January 6, 1970.

It is clear from their letters dated January 6, 1970 and January 28, 1970 (Exhibits P5 and P6) that Kaolin Bhd. decided not to carry out the contract created by the exchanged letters of December 15, 1969 and December 27, 1969, and therefore there was a breach of the contract on their part for which Ng Construction are entitled to damages. As to the claim for special damages, the witness for Ng Construction admitted that there were no receipts to support the claim. As to general damages there is not much evidence to help the Court to ascertain the proper amount. But it is clear from the unchallenged evidence of Ng Shin Cheh that Ng Construction incurred expenses in getting draft and final plans to be prepared, getting photo copies of the plans, looking for workers and machineries, arranging transportation to bring workers to see the work site, and buying some materials. Therefore the Court is left to fix the amount of damages as best as it can. Under the circumstances I consider that general damages of $10,000 should be a fair compensation for loss of profit and other losses suffered by Ng Construction.

Accordingly I order that the appeal be allowed and that judgment be entered for Ng Construction in the sum of $10,000 being general damages. I also order that they should have the costs in this Court and in the court below.

Appeal allowed.

Solicitors: *Fernandez & Co.; Mah-Kok & Din.*

RENAS DEVELOPMENT SDN. BHD. v. PEMUNGUT HASIL TANAH, DAERAH TIMUR LAUT, PULAU PINANG

[O.C.J. (Edgar Joseph Jr. J.) May 18, 1984]
[Penang — Land Aquisition Reference No. 19 of 1979]

Land Law — Land Acquisition — Consent order — Payment of additional sum — Interest whether payable — Rate and date if payable — Land Acquisition Act, 1960, ss. 32, 37, 45, 47 & 48 — R.H.C. 1980, O.42 r. 12.

The questions in this case are, in a land reference under s. 37(1) of the Land Acquisition Act, 1960, where the High Court has recorded a consent order for payment of an additional sum by way of compensation, whether interest is payable on such sum and, if so, at what rate and from what date ought it to run.

The respondent objected to the payment of interest on principle and alternatively on quantum, arguing that the consent order was an award.

Held: (1) the consent order was not an award within the meaning of the Act;

(2) interest on the additional sum is payable and shall run from the date of its pronouncement until payment. The rate of interest should be 6% in the discretion of the court under O.42 r. 12 of the Rules of the High Court, 1980.

Case referred to:

(1) *Parsons* v. *Mather & Platt Ltd.* [1977] 2 All E.R. 715.